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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Southwestern Bell Telephone Company	)	**CC Docket No. 97-158**
Tariff F.C. C. No. 73	)	**Transmittal No. 2633**
	)	

DIRECT CASE OF SOUTHWESTERN BELL TELEPHONE COMPANY

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CC Docket No. 97-158
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Summary*

This Direct Case demonstrates that SWBT's Transmittal No. 2633 should be allowed to take effect immediately as filed. SWBT shows herein that it has satisfied all three prongs of the competitive necessity test, and that no Commission rules or policies should be construed to delay the effectiveness of SWBT's Transmittal.

The Commission's recent Order granting the Hyperion Telecommunications Inc. and Time Warner Communications petitions for forbearance of tariff filing requirements clearly indicates that pricing flexibility is in the public interest where competition is present. The Commission should apply that same reasoning to SWBT's Transmittal No. 2633 and its use of the competitive necessity doctrine.

SWBT satisfies the first prong of the competitive necessity doctrine since its competitors' tariffs, as well as the issuance of the RFP, evidence the existence of competition. As SWBT notes from the D.C. Circuit's decision in Southwestern Bell Telephone Company v. F.C.C. 100 F.3d 1004, (D. C. Circuit 1996), a strict interpretation of the first prong of the competitive necessity doctrine would put SWBT in an untenable position.

SWBT meets the second prong of the competitive necessity doctrine since it has limited its offering to the locations where the RFP evidences competition. SWBT has also only attempted to "match" its competitors' offerings, notwithstanding the limited pricing information available to it.

* All abbreviations used herein are referenced within the text.

SWBT meets the third prong of the competitive necessity defense since, as the Bureau notes, SWBT's prices would recover its direct costs, and since the Commission's rules should be read consistently with the competitive necessity doctrine. The attached article also provides support for SWBT's satisfaction of the third prong of the competitive necessity defense.

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Southwestern Bell Telephone Company (SWBT), pursuant to the Order Designating Issues for Investigation released by the Common Carrier Bureau (Bureau) of the Federal Communications Commission (Commission) on July 14, 1997,[1] hereby files its Direct Case in this matter. This Direct Case shows that SWBT's Transmittal No. 2633 should be allowed to take effect immediately as filed.

At the outset, it is important to note that the Bureau apparently misconstrues SWBT's use of the competitive necessity doctrine. Paragraph 15 of the Designation Order states: "We construe SWBT's contention to be that competitive necessity operates as a complete defense to any claimed violation of Section 202(a) and the Commission's rules that might stem from Transmittal No. 2633, including potential violation of the DS-3 ICB Order . . .." SWBT wishes to clarify that it has not, and does not purport to assert that the Commission's competitive necessity doctrine "operates as a complete defense to any claimed violation of Section 202(a)." Section 202(a) prohibits unreasonable discrimination and the instant filing does not violate Section

[1] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, CC Docket No. 97-158, Transmittal No. 2633, Order Designating Issues for Investigation, (DA 97-1472) (released, Common Carrier Bureau, July 14, 1997). (Designation Order).

202(a).[2] The Commission's orders and rules interpret this statute. While the Commission may waive, modify or otherwise adapt its rules, policies and orders to make them internally consistent, SWBT has not asked the Commission to use the competitive necessity doctrine to modify the statute. SWBT's footnote, cited by the Designation Order as support for its claim, only asks that the Commission consider the competitive necessity doctrine in light of the Commission's orders, rules and policies. The footnote cited does not refer to Section 202(a) at all. SWBT merely requests in this proceeding that the Commission interpret its orders, rules and policies in a consistent manner, and that the competitive necessity doctrine is, in particular, applied consistently with the Commission's other orders, rules and policies.

I. TRANSMITTAL NO. 2633 DOES NOT VIOLATE THE COMMISSION'S POLICY PROHIBITING DOMINANT LECs FROM OFFERING CONTRACT TARIFFS.

The Designation Order seeks comment on whether "Transmittal No. 2633, as a tariff initiated by a LEC to respond to a competitor's offer to an end user, would appear to meet the Commission's definition of an RFP tariff that is prohibited under the Commission's current policy."[3]

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[2] Indeed, the Commission has recently held that pricing flexibility in the form of permissive detariffing is permitted notwithstanding Section 202(a). Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking (FCC 97-219) (released June 19, 1997) at para. 29. The Commission should not apply any less stringent approach to its review of its policies in the instant matter than it did to the review of its policies in the forbearance case. The reasoning used in that case does not limit itself to non-ILEC providers, especially where competition is firmly evidenced by the existence of an RFP.

[3] Designation Order at para. 18.

While the Designation Order claims that RFP tariffs are "prohibited under the Commission's current policy" there is no order cited by the Designation Order that supports this proposition. In fact, the Commission's current policy does not prohibit RFP tariffs. The passages cited by the Order only stand for the proposition that interexchange carriers or nondominant carriers may offer contract tariffs. There is no explicit prohibition in these cited rules that prohibits the filing of contract or RFP tariffs by other carriers, including dominant LECs.

In any event, SWBT has not filed its RFP tariff as a contract tariff. The Designation Order notes that the subject of RFP tariffing is currently under review in the Access Reform NPRM.[4] Nevertheless, competition for incumbent LEC services has not waited for the Commission's decision. Competition for incumbent LEC services grows each day. Thus, the Bureau must determine, immediately, that the competitive necessity defense applies to tariffs such as those filed by SWBT.

II. TRANSMITTAL NO. 2633 DOES NOT VIOLATE THE DS-3 ICB ORDER'S RESTRICTIONS ON TARIFF OFFERINGS ON AN INDIVIDUAL CASE BASIS BY DOMINANT LECs.

The Designation Order seeks comment on whether Transmittal No. 2633 is an ICB tariff and whether such a finding would compel a rejection of the transmittal, assuming a rejection of SWBT's competitive necessity argument.[5]

SWBT has not filed its Transmittal No. 2633 as an ICB tariff. The Designation Order makes no attempt to cite to any portion of SWBT's transmittal or pleadings to support this

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[4] Designation Order at para. 18.

[5] Designation Order at para. 22.

proposition. Thus, the Commission cannot reject Transmittal No. 2633 on the grounds that it is an ICB tariff.

III. TRANSMITTAL NO. 2633 DOES NOT VIOLATE SECTION 69.3(e)(7) OF THE COMMISSION'S RULES REQUIRING DOMINANT LECs TO OFFER AVERAGED RATES THROUGHOUT THEIR INDIVIDUAL STUDY AREAS.

The Designation Order seeks comment on whether Transmittal No. 2633 violates Sections 69.3(e)(7) or 69.123(c) of the Commission's rules.[6]

SWBT's Transmittal No. 2633 does not violate Sections 69.3(e)(7) or 69.123(c). Section 69.3(e)(7) does not state the exceptions to it which have been formed by other Commission rules and policies. Section 69.123(c), in fact, contains an explicit reference to Section 69.3(e)(7). This reference shows that the Commission has, in the past, carved out exceptions to 69.3(e)(7) and the competitive necessity doctrine is merely another one of those exceptions. Further, the Commission's prior order on SWBT's RFP tariff shows that such an exception exists.[7]

IV. COMPETITIVE NECESSITY APPLIES TO SWBT'S TRANSMITTAL NO. 2633.

The Designation Order requires SWBT to explain why competitive necessity should be available to dominant LECs as a defense to discrimination as well as to explain how the

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[6] Designation Order at para. 23.

[7] Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittals Nos. 2433 and 2449, Order Terminating Investigation, 11 FCC Rcd 1215 (1995), remanded, Southwestern Bell Telephone Company v. FCC 100 F.3d 1004 (D.C. Circuit 1996).

interstate access market conditions are similar to the market conditions that existed in the interexchange market when competitive necessity was available to AT&T as a dominant carrier.[8]

The competitive necessity doctrine should be available to dominant LECs for the same reasons that the Commission has applied it to other dominant carriers throughout history. In fashioning the elements of the competitive necessity doctrine, the Commission has never made "the service is offered by other than a dominant LEC" a condition of the test. In Southwestern Bell Telephone Company v. FCC, the Court recognized that the doctrine was originally created "in the context of volume discounts for long distance service," but did not find that the Commission had ever limited this doctrine to long distance service, and noted that the Commission explicitly refrained from holding that the competitive necessity doctrine did not apply to SWBT.[9]

Having explicitly refrained from finding that the competitive necessity doctrine did not apply, the Commission cannot now determine that the opposite holds. Indeed, the case cited by the Commission and most parties in discussion of the competitive necessity doctrine is the Private Line Rate Structure Decision.[10] That matter does not distinguish between dominant and nondominant carriers, or between long distance and local exchange carriers, or between the telecommunications industry and the economy as a whole. The Commission cites a 1983

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[8] Designation Order at para. 24.

[9] 100 F.3d 1004, 1006-07.

[10] Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, Report and Order, 97 FCC 2d 923, (1984). (Private Line Rate Structure Decision).

Supreme Court decision on application of the Robinson-Patman Act in a different industry in support of the Commission's use of the competitive necessity test.[11]

Also attached to this Direct Case, and incorporated herein, is a copy of a 1989 article from the Federal Communications Law Journal discussing competitive necessity.[12] This article explains how permitting customers specific offerings in the telecommunications industry serves the public interest, and can be justified by the competitive necessity doctrine.

The Designation Order asks whether the competitive necessity defense should be applied to SWBT in the circumstances at issue or whether it should be modified in any way. The Designation Order also seeks comment on whether the Commission could reasonably find that the competitive necessity defense is not always available.[13]

In the Commission's prior Order on SWBT's RFP tariff, the Commission assumed, arguendo, that the competitive necessity doctrine was available, but ruled that SWBT did not meet its requirements.[14] There is no explanation in the Commission's Order for its decision to assume that the competitive necessity doctrine was available. Given that the Commission

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[11] Private Line Rate Structure Decision at p. 948, quoting Falls City Industries v. Vanco Beverage 103 Sup. Ct. 1282 (1983). Prophetic in the Private Line Rate Structure Decision is Commissioner Quello's concurring statement, which states, in part: "We must continue to scrutinize the tariffs filed by the dominant carrier and the operating companies to ensure that they do not abuse their market power. The other side of that coin requires that the Commission not make unreasonable or impossible demands for a precision which is both unreasonable and unnecessary." (Commissioner Quello, concurring.) (emphasis added).

[12] Larson, Monson & Nobles, "Competitive Necessity & Pricing in Telecommunications Regulation," 42 Federal Communications Law Journal 1 (1989), attached as Appendix 1.

[13] Designation Order at para. 25.

[14] Southwestern Bell Telephone Company v. FCC 100 F.3d 1004, 1007.

provided no justification for reversal of this position, its decision to so assume should be reaffirmed in this case.

Given this precedent, the Commission cannot now reasonably find that a competitive necessity defense is not always available, nor that it could be modified so as not to be available to SWBT in the circumstances at issue. As noted above, the Commission's prior descriptions of the competitive necessity doctrine do not distinguish between the type of carrier to which it is available. Indeed, the Commission looked outside the telecommunications industry for the basis upon which to create the competitive necessity doctrine in telecommunications. Thus, the Commission cannot now find that a particular segment of the telecommunications industry does not have the competitive necessity defense available to it.

Assuming, arguendo, that the Designation Order's assertion is correct that it is relevant and necessary to determine that the conditions experienced in today's access markets are similar to the conditions experienced by AT&T when it was granted competitive necessity, several comparisons can be noted.

From a technical perspective, access provides merely the end pieces of an interexchange call. Interexchange calls cannot be completed without access just as access services are useless without the connecting interexchange facilities. For every access minute there is a corresponding interexchange minute. Access is merely an artificial distinction created by divestiture. There is now no reason to regulate the pieces differently.

Just as there are many providers of interexchange services, there are likewise many providers of access services. Both markets contain many facility-based providers as well as resale providers. In one of the RFPs at issue here, as with SWBT's previous RFP filing, SWBT has

apparently lost the business to another provider. This outcome is not uncommon in many of the competitive markets SWBT serves.

In 1984, when the competitive necessity doctrine was first applied to the interexchange marketplace, AT&T's interstate switched market share was 84.2%. As SWBT has documented before, SWBT market share losses in major markets sometimes exceeds 40%, over twice as much as experienced by AT&T in 1984.[15] There is overwhelmingly enough evidence to conclude that the access marketplace is more competitive than the interexchange marketplace was when the Commission first granted it competitive necessity.

The Designation Order seeks comment on whether it is ever possible to satisfy the first prong of a competitive necessity test in an RFP situation, whether it should be changed to accommodate RFP situations, or whether it should be unavailable in RFP situations.[16] As noted above, precedent prohibits the Commission from changing the competitive necessity test so as to make it unavailable to dominant LECs. Likewise, the Commission cannot carve out an instance where the competitive necessity test would be unavailable. To the extent modification of the test is considered, the test should be modified to make it more available to dominant LECs, not less available. Foreclosure of any ability to use the competitive necessity test would prejudice the rights of dominant LECs to meet competition. The record does not justify such a foreclosure of rights.

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[15] SWBT retains only a 57% and 62% high capacity market share in Dallas and Houston respectively as of 3Q, 1996. Quality Strategies Report, 11/96.

[16] Id.

The Designation Order asks parties to address whether the difficulty in ascertaining other competitors' bids for purposes of tailoring a competitive response requires a conclusion that the competitive necessity defense should not apply in the RFP context. The Designation Order also seeks comment on whether the Commission should further define the types of competitive responses that would be deemed reasonable responses to RFPs.[17]

The Court has recognized that LECs are in an untenable position in an RFP situation under the first prong of the Commission's competitive necessity test. In recognizing that the Commission had improperly rejected SWBT's use of the competitive necessity doctrine, the Court noted:

> Southwestern Bell thus forcefully argues that the Commission's Order puts Petitioner in a classic Catch-22 situation -- it must either obtain competitors' rates, which may violate the antitrust laws, or lose competitive bids -- and accordingly cannot be regarded as other than arbitrary and capricious.[18]

Thus, instead of concluding that the competitive necessity defense should not apply in the RFP context, the Court's decision affirms both SWBT's right to use the defense and its inability to satisfy a strict interpretation of its first prong. Thus, the Commission is prohibited from strictly interpreting the first prong against SWBT, and must allow SWBT to satisfy it as SWBT has done.

The Designation Order requires SWBT to provide further explanation on how it is satisfying each prong of the current test for competitive necessity. The following section addresses the Bureau's questions on the three prongs of the test.[19]

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[17] Designation Order at para. 26.

[18] 100 F.3d 1004, 1007.

[19] Designation Order at para. 27.

A. SWBT Has Satisfied the First Prong of the Competitive Necessity Defense.

The Designation Order requires SWBT to resubmit the tariff pages in support of its claim.[20] The Designation Order seeks comment on whether SWBT's evidence is sufficient to satisfy the first prong of the competitive necessity test.

The tariff pages SWBT relies upon to support its position are attached as Exhibit "A." Listed below are the examples originally cited by SWBT in its D&J of Transmittal No. 2633.

MFS Telecom, Inc. Tariff F.C.C. No. 2 (effective July 13, 1995)

Contract Number	State	Service Description	Rate Package	
			Monthly	Non-Recurring
002408	TX	Very High Cap Service	$ 1,800.00	$ 800
002413	TX	Very High Cap Service	$11,849.00	$7,406

Time Warner Communications, Tariff F.C.C. No. 2 (effective April 2, 1996)

City or LATA	Service Type	Monthly Recurring	Installation Charge
Austin	High Capacity	$ 826.20	$ 720.00
	High Capacity	$ 693.75	$ Cost
Houston	High Capacity	$ 781.25	$ Cost
	High Capacity	$ 677.09	$ Cost

The "Very High Cap Service" (in the case of MFS) or "High Capacity" (in the case of Time Warner) are probably comparable to a DS3 service since MFS and Time Warner use this terminology, respectively, elsewhere in their tariffs. It therefore appears, using the above cited

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[20] Designation Order at para. 29.

tariffs, that on a per unit basis Time Warner may offer DS3 service (in addition to some form of self-healing transport service such as SWBT's STN service - see footnote 13 on page 8 of SWBT's Description and Justification) at $677.09 per DS3 per month. MFS may similarly offer this service at $1800 per DS3 per month.

This evidence is more than sufficient to satisfy the first prong of the competitive necessity test, specifically showing that lower priced alternatives are available. As the Court has noted, no other evidence may be available than the RFP itself. The Court noted that the tariff prices cannot be recognized by SWBT as the price that a CAP would actually bid. It is likely that a CAP would bid lower than its tariffed prices to win a bid since the customer could merely order from the CAP at its tariffed rates if it wished to do so without the benefit of a bid. The Court noted that the difficulty of determining a price that a CAP would bid from a CAP's tariffs confirms SWBT's position that an RFP situation may put SWBT in a Catch-22 situation unless the Commission interprets the competitive necessity doctrine to allow SWBT to bid upon the receipt of the RFP alone.[21]

The Designation Order seeks comment as to the weight, if any, that should be given to the issuance of one or more RFPs in determining the extent of competition.[22]

The issuance of one RFP should be sufficient to determine that competition exists for purposes of the competitive necessity test. As the Court noted, any other interpretation might put SWBT in a Catch-22 situation in which it would either lose the business or potentially violate

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[21] 100 F 3d 1004, 1007.

[22] Designation Order at para. 30.

the antitrust laws.[23] Thus, any other requirement (i.e., the existence of more than one RFP) should not be needed to establish competition.

B. SWBT Meets the Second Prong of the Competitive Necessity Test.

The Designation Order seeks comment on the reasonableness of the SWBT restrictions in light of the second prong of the competitive necessity test. The Designation Order tentatively concludes that Transmittal No. 2633's rates would not be available to customers other than AT&T and Coastal and seeks comments on this conclusion.[24] The Designation Order also seeks comments as to whether a carrier may permissibly limit an offering to a single geographical area or customer.[25] The Designation Order also seeks comment on the reasonableness of whether Transmittal No. 2633 gives SWBT "unchecked discretion to decide when a 'competitive situation' exists."[26]

SWBT's Transmittal No. 2633 precisely meets the second prong of the competitive necessity doctrine. SWBT, in its particular RFP proposals planned to offer this service at $700 and $772, to AT&T and Coastal Telephone, respectively.

SWBT's range of pricing is justified by both the evidence found in the competitor's tariffs as well as what SWBT understands from the market. As can be seen from the illustration above, SWBT's intended prices for the RFPs are between the cited high and low competitor prices. Based on this information, SWBT has satisfied and stayed within the

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[23] 100 F.3d 1004, 1007.

[24] Designation Order at para. 33.

[25] Designation Order at para. 33.

[26] Designation Order at para. 33.

guidelines of the second prong of the competitive necessity test, insofar as the discounted offering responds to the competition without undue discrimination. As noted above, SWBT has only attempted to come close to matching the Time Warner tariffs, based on the best available information.

SWBT has likewise not attempted to extend the availability of its offer beyond the evidence that it has of competition. Should SWBT make this offer available to all other customers, it would not have the competitive evidence from the RFP itself to do so, and thus the competitive necessity test would not appear to justify such an extension.[27] Therefore, the Commission should not reject SWBT's Transmittal No. 2633 for its failure to be available to a sufficient number of other customers since SWBT has reasonably limited it to comply with the Commission's second prong of the competitive necessity test.

Due to the nature of geographically specific pricing, there is certainly not an unlimited number of similar customer situations for the RFPs in question. However, counter to Sprint's claim, there does exist the ability for customers other than AT&T or Coastal to take advantage of the specific RFP prices listed therein. As SWBT explained in its D&J, a customer is similarly situated when the service requested is technically equivalent (same bandwidth or "bit-rate," e.g., 44.736 Mbps) and the service is provided out of the SWBT central offices as listed in the tariff for the specific RFP rates.

To further clarify the similarly situated scenario, the following example, used in SWBT's original D&J, is expanded as follows. A customer who is located in Houston, Texas,

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[27] Nevertheless, SWBT seeks clarification from the Commission on the extent to which the Commission believes SWBT should be required to extend the discount in such cases.

whose premise(s)' serving wire center is the same as any of the SWBT central offices listed in the tariff (e.g., Clay, National or Capital), and who desires the same number of nodes in an STN configuration (with the quantity and location of access nodes as listed) would be eligible for the same rate as was proposed for Coastal Telephone Company.

SWBT acknowledges that the probability of this situation repeating itself may be somewhat limited but it is not virtually impossible as Sprint claims.[28] In order for SWBT to broaden its pricing range to offer the same price to any market area "with similar levels of competition" as the Commission notes in the Order, it would be necessary for SWBT to geographically average its prices. This practice would obviously contradict the entire philosophy behind competing for a particular service in a specific geographic location, due to the extreme cost sensitivity of the pricing in these situations. Thus, the perceived discrimination is not unreasonable and other customers could take advantage of the RFP rates in the situations as they have been presented.

SWBT does not have "unchecked discretion" to decide who qualifies for the RFP discount, or subsequent RFP discounts, and in any event, SWBT's discretion will not harm any customer. To the extent SWBT files future RFP discounts, such discounts will be subject to Commission review and treatment. To the extent that SWBT, in a customer's view, fails to offer an RFP discount where a customer feels one is deserved, that customer is not harmed. For a customer to show that SWBT had discriminated against a customer, that customer would first need to show the availability of a competitive offering (since SWBT can only "match" a

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[28] Designation Order at para. 33 ("to ensure that only AT&T and Coastal, and no other customers, will be able to obtain the rates listed in the transmittal.")

competitor's discount). Assuming that the competitive offering was shown to be available, that customer would always have the ability to choose that competitive offering and should not be harmed by SWBT's failure to "match" that offering. Conversely, SWBT has no incentive to offer discounts to customers that have no competitive alternative. Thus, sufficient safeguards are in place to check SWBT's discretion in the use of RFP tariffs.

C. SWBT Satisfies the Third Prong of the Competitive Necessity Defense.

The Designation Order seeks comment on whether competitive necessity operates as a defense to any violation of Section 202(a), the statute, the Commission's rules or policies, including the DS3-ICB Order, prohibitions against contracts and RFP tariffs, and other Commission rules permitting deaveraging of access rates.[29]

As noted above, SWBT has not, and does not claim that the competitive necessity doctrine serves as an exemption to the statute, but only to the Commission's interpretations of that statute. The Commission must interpret all of its policies consistently and effectively. Unless the competitive necessity doctrine is available as an exception to the Commission's other rules and policies, they cannot be read consistently with one another. The Designation Order cites the New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 1077 matter as an example of a holding where competitive necessity did not serve as an exemption to the Commission's rate averaging rules. An analysis of that decision reveals that that case did not provide any better explanation for the conflict between the competitive necessity doctrine and the rate averaging rules than the Commission's decision on SWBT's prior RFP tariff. That Commission decision on SWBT's prior RFP tariff has been remanded for its failure to provide a "more coherent, and

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[29] Designation Order at para. 35.

perhaps more forthright, explanation of its action." Thus, the New York case would seem to be no better precedent than the Commission's prior, remanded, action on SWBT's RFP tariff.

V. CONCLUSION

For the foregoing reasons, SWBT respectfully requests that the Commission allow its Transmittal No. 2633 to take effect immediately as filed.

Respectfully submitted,

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COMPETITIVE NECESSITY AND PRICING IN TELECOMMUNICATIONS REGULATION

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Competitive Necessity and Pricing in Telecommunications Regulation*

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INTRODUCTION

A 1988 decision by the Federal Communications Commission[1] allowed American Telephone and Telegraph (AT&T) to introduce the Holiday Rate Plan, the first in a series of Competitive Pricing Plans offering individually priced rates designed to meet other carrier's competitive offerings. The Holiday Rate Plan was designed for business customers with calling volumes larger than a typical message toll service (MTS) customer, but smaller than the volume that would justify obtaining WATS or other services.[2] AT&T, which submitted *Tariff No. 15* in early 1988 in response to an off-tariff discount offer made by its com-

1. AT&T Communications Competitive Pricing Plans — Holiday Rate Plan, Memorandum Opinion & Order, 65 R.R.2d 433 (1988) [hereinafter *Tariff No. 15*].

2. WATS is an acronym for Wide Area Telecommunications Service, essentially a bulk-rated long distance service for high-volume industrial users like Holiday Corp. WATS customers purchase long distance minutes of use by the hour at huge volume discounts instead of being charged on a per-call basis, as is the pricing method used with residential and small business customers.

petitor, MCI Communications Corp. (MCI), to Holiday Corp., argued that customer-specific pricing plans are necessary to keep AT&T from losing large business accounts.

AT&T offered Holiday Corp., the nation's largest hotel chain, discounts of 5 to 10 percent on its PRO America II service. According to AT&T, the prices offered under the Holiday Rate Plan were still above the prices in MCI's offer and were justified by competition. MCI and other competitors in the long distance market have opposed *Tariff No. 15* on the grounds that as a designated "dominant carrier," AT&T is bound by the Communications Act of 1934[3] to offer the same tariffed rates to all customers wishing to purchase a given service. In 1988, the FCC voted interim approval of AT&T's *Tariff No. 15*, pending investigation as to the legality under the Act of the competitive pricing proposal.

Most recently, the FCC rejected AT&T's Holiday Rate Plan on narrow factual grounds.[4] The Commission rejected the Holiday Rate Plan because MCI "somewhat belatedly" announced that its own discount offer to Holiday Corp. was generally available to all similarly situated customers.[5] Despite this ruling, the FCC did not voice an opinion on whether AT&T has the right to match competitors' offers if that means providing discounts not generally available to other customers. The FCC specifically stated that its current decision does not presume a ruling on the legality of the Holiday Rate Plan at the time it was filed.[6] At the time of this latest ruling, AT&T filed a similar *Tariff No. 15* proposal to serve Resort Condominiums International, to meet another MCI bid.

The *Tariff No. 15* proceeding has "reignited a long-smoldering industry debate over the structure and regulation" of the long distance market,[7] dating back to AT&T's TELPAK tariffs. The FCC's recent ruling is but the latest installment in this long-

3. 47 U.S.C. § 151 (1982) [hereinafter Act].

4. AT&T Communications Competitive Pricing Plans, Subsequent Order, Memorandum Opinion & Order, FCC 88-471 (Nov. 8, 1989) [hereinafter *Tariff No. 15 Subsequent Order*].

5. *Tariff No. 15 Subsequent Order*, *supra* note 4, Concurring Statement of Commissioner Quello.

6. *Tariff No. 15 Subsequent Order* at ¶ 20.

7. Killette, *Toll Tariff Turmoil*, COMMUNICATIONS WEEK, Sept. 26, 1988, at 1. *See also*, *infra* Section II.

running debate, which raises the following issues addressed in this Article.

Is it unlawful under the Act for a large, well-established telecommunications carrier like AT&T to offer customer-specific bids containing rates and terms more favorable than those offered to other customers? Is it in the public interest for such carriers, normally subject to stringent public utility regulation, to be allowed to sell to certain large, lucrative customers on an "off tariff" basis, or do such regulatory pricing policies merely "open the door" to anti-competitive pricing practices? Is competition in the market enhanced or harmed by permitting regulated carriers to make customer-specific bids? What are the circumstances under which customer-specific offerings can lawfully be made by non-dominant carriers, but not by dominant carriers? Do customer-specific bids constitute unreasonable discrimination and undue preference under Section 202(a) of the Act if "competitive necessity" is shown to exist? What is the proper way to allow such pricing flexibility while ensuring that anti-competitive practices are not taking place?

This Article will show that permitting customer-specific offerings in the telecommunications industry serves the public interest. Benefits from customer-specific offerings accrue to all customers and to the competitive environment in general as well as to the large customers that are the objects of the offerings. These offerings are justified by the competitive necessity doctrine.

I. COMPETITIVE NECESSITY IN FCC RULINGS

In a series of decisions beginning with its earliest review of the competitive necessity doctrine, the FCC has indicated its growing concern for furthering competition within the long distance industry. The FCC has repeatedly stated that competition provides the best means of furthering the Act's goal of providing the American public with efficient telecommunication services through adequate facilities at reasonable prices.[8] Competition drives prices toward costs, encourages innovation, and raises the

8. *See, e.g.*, Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, Memorandum Opinion and Order, 50 Fed. Reg. 42,945 (1985) [hereinafter *OCP Guidelines*].